No. 89-640

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MANUEL LUJAN JR.,
SECRETARY OF THE INTERIOR, *ET AL.*,
Petitioners,

v.

NATIONAL WILDLIFE FEDERATION, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION AND THE HONORABLE STEVEN D. SYMMS, UNITED STATES SENATOR, IN SUPPORT OF PETITIONERS

*Terence P. Ross
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Of Counsel:
Lisolette E. Mitz
Gary M. Kramer
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

**Counsel of Record*

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INTERESTS OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a non-profit, public interest law and policy center based in Washington, D.C. which is dedicated to supporting the

free enterprise system and promoting the principles of judicial restraint. Current membership in the WLF is approximately 120,000, and includes businesses as well as individuals. WLF advances its objectives through litigation and participation in administrative proceedings in both state and federal forums. To this end, WLF has appeared before this Court as well as other state and federal courts as *amicus curiae* in cases affecting business.[1] As a representative of business interests, WLF is vitally interested in promoting the certainty, predictability, and financial stability of business interests. WLF believes that these objectives are thwarted by undue judicial interference with the actions of the elected branches of government.

The Honorable Steven D. Symms is a United States Senator representing the State of Idaho. Senator Symms is concerned with land-use policy regarding public lands located in Idaho and other states.

Judicial interference with the massive federal program challenged in this case has disrupted an extraordinary number of business transactions, has subverted the establishment of a comprehensive land-use policy for public lands, and has violated the principle of separation of powers. Accordingly, WLF and Senator Symms file this brief as *amici curiae* urging reversal of the decision below.

WLF and Senator Symms submit this brief on behalf of petitioners with the written consent of both parties.

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[1]*See e.g., H.J., Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989); *Meese v. Keene*, 481 U.S. 465 (1987); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* adopt by reference the statement of the case set forth by petitioners.

SUMMARY OF ARGUMENT

Prior to 1970, the traditional standing requirement of a particularized injury was consistently applied by the Court to all manner of cases. The Court's uniform application of this requirement was critical to restricting the federal judiciary to its limited constitutional role under the principle of separation of powers: protection of individual rights, rather than the administration of public policy.

During the early 1970s, however, the Court appeared to dramatically relax this traditional standing requirement. In a series of cases brought under the Administrative Procedure Act (the "APA"),[2] the Court held that a single individual had standing to seek judicial review of virtually any executive branch action of widespread application, merely by alleging injury to a generalized legal right or interest.

This dramatic shift in the Court's approach to standing halted abruptly in the mid-1970s. Since then, the Court has repeatedly reiterated that the particularized injury requirement is a necessary element of standing. Because, however, none of these latter cases arose under the APA, and thus did not expressly address the relaxed standing requirements applied by the Court in that context, lower courts have continued to apply a more relaxed standing doctrine in cases brought under

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[2]Pub. L. No. 89-554, 80 Stat. 392 (codified as amended in various sections of 5 U.S.C.).

the APA. This case presents the Court with the opportunity to restore the traditional standing requirement of a particularized injury to cases arising under the APA.

The failure of the lower courts to apply the requirement of a particularized injury in the administrative context has led to a steady erosion of the principle of separation of powers, resulting in "an overjudicialization of the process of self-governance."[3] The federal judiciary, rather than elected officials, has increasingly assumed the role of administrator of public policy.

This lawsuit epitomizes the failure of the judicial branch to adhere to traditional standing principles in the administrative law context. Through alleged injury to two individuals, the judicial branch has assumed jurisdiction over, and virtually nullified, an entire federal program of nationwide application. This intervention by the judiciary occurred despite the clear expression of Congress that it supported -- and intended to retain oversight and control over -- the executive branch program at issue.[4] Moreover, although petitioner has characterized the issue in this case as one of inadequate

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[3]Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881 (1983).

[4]Congress enacted the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. §§ 1701-1784 (1988), in order to establish aa comprehensive land-use policy for public lands. 43 U.S.C. § 1701 (1988); H.R. Rep. No. 1163, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 6175. The FLPMA repealed certain "implied" withdrawal authority of the President, and redelegated this authority to the Secretary of Interior. *Id.* at 6203. Through such redelegation Congress retained control over the disposition of public lands, including the ability to reject withdrawal termination recommendations of the Secretary of Interior. *Id.* at 6183-84. *See also* 43 U.S.C. § 1714(l) (1988).

pleading,[5] *amici* contend that even if respondent alleged a "direct injury" to its members, it lacks standing to challenge the program at issue. Respondent's asserted injury, if any, is a generalized one, shared equally by all citizens of the nation, and therefore is not cognizable under traditional requirements of standing.

Amici will argue that the Court must restore the traditional standing requirement that a plaintiff's asserted injury be a particularized one, which sets him apart from other citizens, and that this Court must emphasize that this requirement applies to litigation arising under the APA. This traditional understanding of the doctrine of standing is critical to restricting the judicial branch to its constitutional role of protecting individual rights rather than generalized societal goals. Under the doctrine of separation of powers, the former is committed to the courts, while the latter is the sole province of the elected branches.

ARGUMENT

A. The Requirement Of A Particularized Injury Is Essential To Preserving The Principle of Separation of Powers.

The doctrine of standing is fundamental to the maintenance of our constitutional form of government.[6]

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[5]Petition for Writ of Certiorari, *Lujan v. National Wildlife Fed.*, No. 89-640, at (i).

[6]This Court has "consistently given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 109 S. Ct. 647, 658 (1989). The Constitution provides that each branch of government will exercise "inher-

(continued...)

Its purpose is to confine the judicial branch to the exercise of its "inherently distinct" power to adjudicate the rights of individuals as presented in "cases" or "controversies."[7] Whereas the elected branches of government are concerned chiefly with broad societal interests, the judiciary is concerned with individual or minority rights,[8] including rights that may be threatened as a consequence of legislative or executive action. The doctrine of standing serves to identify the individuals or minority groups entitled to judicial protection and to ensure that such protection is available where the legally protected rights of those individuals or groups are infringed or threatened. *Allen v. Wright*, 468 U.S. 737, 750 (1984).

In *Frothingham v. Mellon*, 262 U.S. 447 (1923) ("*Frothingham*"), the Court articulated the importance of the doctrine of standing, and especially the requirement of a particularized injury, in preserving the principle of separation of powers. In *Frothingham*, a taxpayer sought to restrain payments from the United States Treasury to several states that chose to participate in a federal program established through the Maternity Act of 1921. The plaintiff claimed that the federal government lacked power to appropriate money for the reduction of maternal and infant mortality, and that such

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[6](...continued)
ently distinct" powers, and will act as "'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'" *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-58 (1982) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (*per curiam*)).

[7]U.S. Const. art. III, § 2.

[8]*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) ("The province of the Court is, solely, to decide on the rights of individuals . . . .").

appropriations would cause an increase in her taxes and "thereby take her property without due process of law." *Id.* at 486. The Court did not reach the merits of the claim, holding instead that neither her purported injury nor the "right" invaded was an appropriate basis on which to invoke the power of the Court. The taxpayer's "interest in the money of the treasury . . . is shared with millions of others, is comparatively minute, and indeterminable, and the effect upon future taxation . . . so remote, fluctuating and uncertain that no basis is afforded" for judicial review. *Id.* at 468. In order to merit standing, the Court wrote:

> The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Id. at 488. *Frothingham* thus concluded that unless a litigant asked the Court to resolve a dispute that affected him *particularly*, as opposed to the public at large, the dispute was to be resolved not in Court, but in the elected branches of government. *Id.*

B. The Elimination Of The Particularized Injury Requirement Eviscerates The Principle Of Separation Of Powers.

The *Frothingham* requirement of particularized injury was applied uniformly by the Court until 1970, both in cases arising under the APA[9] and in other

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[9]*E.g.*, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (holding that drug manufacturers had standing under the APA to (continued...)

contexts.[10] In 1970, however, this Court imputed to Congress the intent to eliminate the particularized injury requirement in lawsuits brought under the judicial review provision of the APA. This provision states that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 5 U.S.C. § 702 (1988). In *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) ("*Data Processing*"), the Court interpreted this provision to confer standing on any complainant under the APA so long as "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. The Court thereby "[enlarged] the class of people who may protest administrative action" under the APA. *Id.* at 154. Indeed, the Court noted in dictum that the expanded construction of the APA embraced "'aesthetic, conservational, and recreational' as well as economic values." *Id.* at 154 (quoting *Scenic Hudson Preservation Soc'y Conf. v. Federal Power Comm'n*, 354 F.2d 608, 616 (2d Cir. 1965)). This broad construction of the judicial review provision of the APA has had the effect of allowing persons to sue under the APA

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[9](...continued)
challenge Food and Drug Administartion regulations specifically directed at drug manufacturers); *American Trucking Ass'ns, Inc. v. United States*, 364 U.S. 1 (1960) (granting standing under the APA to a trucking association to challenge a regulation affecting railroads due to the pecuniary interests of competitors).

[10]*E.g.*, *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) (holding that "[t]he common thread underlying [standing] requirements is that a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation").

regardless of whether they can allege a particularized injury.

Two cases subsequent to *Data Processing* illustrate the effect that decision has had on environmental litigation brought under the APA. In *Sierra Club v. Morton*, 405 U.S. 727 (1972) ("*Sierra Club*"), an environmental organization sued to enjoin the development of a ski area in California's Sequoia National Park. The organization averred that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." *Id.* at 734. The Court held that, although the asserted injury to plaintiff's "aesthetic and environmental" interests was judicially cognizable,[11] the Sierra Club had not alleged that "its members use [the Park] for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of respondents." *Id.* at 735. Unlike the plaintiff in *Data Processing*, the Sierra Club had not suffered an "injury in fact," and therefore did not satisfy the traditional requirements of standing. *Id.*

The pleading defect of *Sierra Club* was held to be remedied in *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) ("*SCRAP*"). In *SCRAP*, an environmental association filed suit to enjoin an order by the Interstate Commerce Commission allowing railroads to collect a 2.5% rate surcharge. The basis of the association's claim was that the railroad rate surcharge would make the transportation of glass, paper, metals and other recyclable

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[11]As in *Data Processing*, 397 U.S. at 154, the Court in *Sierra Club* indicated that "aesthetic and environmental interests" are cognizable under the APA without specifying the underlying statute that protects these interests. 405 U.S. at 734.

materials to recycling centers too costly. As a consequence, there would be less recycling, an increase in landfills and litter, and greater use of natural resources rather than recycled materials. The association's members claimed that they would be personally harmed by the resultant air pollution from a decreased use of incinerators, that the local parks and forests on which they claimed to recreate would be scarred from natural resource exploitation and garbage, and that use of new resources would increase the cost of finished goods. *Id.* at 678, 680 n.8; *id.* at 700 (Douglas, J., dissenting).

The Court held that the association members had alleged "a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected." *Id.* at 689. The Court reaffirmed its prior holding in *Sierra Club* that "'[a]esthetic and environmental'" injury was redressable by the courts, *id.* at 686, and concluded that "the fact that all those who used those [natural] resources suffered the same harm" did not deprive the association of standing. *Id.* at 686-87. Indeed, the Court intimated that "all who breathe the air" could challenge the surcharge. *Id.* at 682. This statement illustrates the extent to which the particularized injury requirement had been abandoned in environmental litigation brought under the APA.

C. The Particularized Injury Requirement Should Be Applied Uniformly To All Cases.

One year after *SCRAP* the Court returned to the traditional standing requirement of particularized injury and has continued to enforce this requirement against litigants who assert generalized grievances in federal courts. For example, in *United States v. Richardson*, 418 U.S. 166 (1974), the Court declined to grant standing to a taxpayer who sought to compel the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the Central Intelligence Agency ("CIA"). Congress had not required such an accounting in the Central Intelligence Agency Act of 1949, the organic act of the CIA. The Court wrote that, although the plaintiff possessed a "genuine interest in the use of funds, . . . he has not alleged that, as a taxpayer, he is in danger of any particular concrete injury as a result of the operation of the statute." *Id.* at 177. Accordingly, the plaintiff merely was seeking to employ a "'federal court as a forum in which to air his generalized grievances about the conduct of government.'" *Id.* at 173 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

Similarly, in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), the Court denied standing to citizens who sought to enforce the incompatibility clause, U.S. Const. art. I, § 6, cl. 2, of the Constitution against Members of Congress who held reserve military commissions. As citizens, the Court held, plaintiffs alleged only "the abstract injury in nonobservance of the Constitution . . . ." *Id.* at 223. The Court wrote that the need for a distinct injury not shared by the citizenry in general is essential to standing, particularly where "the relief sought would, in practical effect, bring about conflict with the coordinate branches." *Id.* at 222.

In *Allen v. Wright*, 468 U.S. 737 (1984), the Court denied standing to parents of black schoolchildren in a challenge to a decision by the Internal Revenue Service to confer tax-exempt status on allegedly racially discriminatory private schools. The parents claimed that government support of such schools increased the stigma caused by racial discrimination. While noting that stigmatic injury is judicially cognizable, the Court held that "such injury accords a basis for standing only

to 'those persons who are personally denied equal treatment by the challenged discriminatory conduct.'" *Id.* at 738 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)). Thus, this Court has repeatedly reaffirmed the traditional requirement that one must assert a particularized injury to have standing to challenge governmental action in federal court.[12]

As the foregoing discussion demonstrates, in the years since *SCRAP*, the Court has revisited the requirements of standing in various cases not arising under the APA. In each of those cases the Court held that the particularized injury requirement was a necessary element of standing without which a citizen simply could not sue. There is no principled explanation for the more relaxed standing requirement in *Data Processing*, *Sierra Club* and *SCRAP*. Unfortunately, those cases have paved the way for "a flood of new litigation . . . seeking judicial assistance in protecting our natural environment" through claims that executive officials have "failed to live up to the Congressional mandate." *Calvert Cliffs Coordinating Comm'n v. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971). As with the instant case, litigation arising under

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[12]*See also Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (holding that "federal court[s] may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional"); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (holding that taxpayers do not have standing to challenge an incidental disposition of government property by an executive officer as inconsistent with the establishment clause); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (holding that plaintiff must allege an injury that is "'distinct and palpable'") (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); *Baker v. Carr*, 369 U.S. 186, 208 (1962) (noting that citizens cannot invoke standing predicated on "'the right, possessed by every citizen, to require that the Government be administered according to law'") (quoting *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922)).

the APA has effectively substituted federal judges for both legislators and executive officials with respect to public policy regarding our natural environment and public lands.[13] This case presents the Court with the opportunity to correct this aberration -- and its undermining of the principle of separation of powers -- by restoring the rule of particularized injury to cases arising under the APA.

D. Respondents Have Not Alleged A Particularized Injury.

The essence of respondents' purported injury in this case is that "its many members who 'use and enjoy the

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[13]The Court's description of the facts in *Sierra Club* illustrates how environmental plaintiffs have resorted to courts after failing to realize their public policy goals through the political process:

> Representatives of the Sierra Club, who favor maintaining Mineral King largely in its present state, followed the progress of recreational planning for the valley with close attention and increasing dismay. They unsuccessfully sought a public hearing on the proposed development in 1965, and in subsequent correspondence with officials of the Forest Service and the Department of the Interior, they expressed the Club's objections to Disney's plan as a whole and to particular features included in it. In June 1969 the Club filed the present suit in the United States District Court for the Northern District of California, seeking a declaratory judgment that various aspects of the proposed development contravene federal laws and regulations governing the preservation of national parks, forests, and game refuges, and also seeking preliminary and permanent injunctions restraining the federal officials involved from granting their approval or issuing permits in connection with the Mineral King project.

405 U.S. at 729-730. Judicial indulgence of the Sierra Club after its defeat in the political arena clearly would have subverted the democratic process by implementing the views of a minority over the clearly expressed views of the majority.

environmental resources that will be adversely affected by the challenged actions' would be deprived of such use by the development of these lands." *National Wildlife Fed'n v. Burford*, 878 F.2d 422, 426 (D.C. Cir. 1989). Respondents predicate their standing on the alleged injury of two individuals who recreated on land "in the vicinity of" parcels of land affected by the Secretary's action. The district court held that this allegation was insufficient to support standing because it did not meet the "injury in fact" requirement of standing.[14] *Burford*, 699 F. Supp. 327, 332 (D.D.C. 1988), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989). *Amici* maintain that even if, *arguendo*, these two individuals alleged that they recreated *directly* on land affected by the petitioner's actions, respondents still do not show the requisite particularized injury to challenge the federal program at issue.

Respondents' asserted injury is the diminished ability to recreate on public land due to its potential development. But the ability of each citizen to recreate on this public land is diminished equally. Respondents do not claim, nor can they claim, that they possessed a greater right than their fellow citizens to recreate on the affected parcels of land; they claim merely to have exercised this right more than their fellow citizens on two separate parcels, which together account for a minute fraction of the land affected by the petitioner's challenged actions. Accordingly, respondents are not *distinctly* affected by the diminished right to recreate.

Furthermore, past use does not indicate the existence of an interest, it merely indicates the strength of the individual's interest. Respondents may *care* more

[14]In essence, the district court viewed this case as analogous to *Sierra Club v. Morton*, 405 U.S. 727 (1972), discussed *supra* part B. *Burford*, 699 F. Supp. at 331-32.

about this diminishment, but "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge*, 454 U.S. at 486. Nor can past use be used to presume that there will be future injury. *See Los Angeles v. Lyons*, 461 U.S. at 106. This lawsuit is simply a dispute involving public interests to public land. Accordingly, respondents must convince their fellow citizens of more enlightened uses of this land through the political process, rather than through the courts.

CONCLUSION

The relaxation in administrative law cases of the traditional standing requirement of a particularized injury is wholly lacking in any principled justification. The effect of this relaxed standing requirement is the erosion of the principle of separation of powers and the usurpation by the judiciary of powers entrusted by the Constitution to the elected branches of our government.

The Court should recognize the equal importance, in litigation arising under the APA, of the particularized injury requirement in preserving the principle of separation of powers. In so doing, the Court should reconsider its decisions in *Data Processing*, *Sierra Club* and *SCRAP* in the light of its more recent decisions.

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

*Terence P. Ross
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

*Counsel of Record

Of Counsel:

Lisolette E. Mitz
Gary M. Kramer
Gibson, Dunn & Crutcher
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

March 2, 1990